UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/522
30 May 1991
ENGLISH

ORIGINAL: FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 522

Case No. 530: PETRUC

Against: The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, Vice-President; Mr. Samar Sen;

Whereas, on 27 November 1989, Theodore Claude Petruc, the recipient of a retirement benefit from the United Nations Joint Staff Pension Fund (Pension Fund), filed an application containing the following pleas:

"PLEAS

(a) Mr. PETRUC requests the Tribunal to order the United Nations Joint Staff Pension Fund to produce the record of the Medical Board of 26 November 1987, which Mr. PETRUC has asked for on several occasions without success.

(b) Mr. PETRUC requests rescission of the decision taken by the Standing Committee of the United Nations Joint Staff Pension Fund at its 169th meeting, held on 21 July 1989 (...).

c) M. PETRUC requests the Tribunal to declare and judge that on the date of his separation from service with FAO, 31 October 1976 (not 1986 ...), he satisfied the conditions stipulated in article 33(a) of the Regulations of the Joint Staff Pension Fund and accordingly was entitled to a disability benefit payable by the Fund.

d) To declare and judge that the United Nations Joint Staff Pension Fund should, in accordance with section H of the Administrative Rules of the United Nations Joint Staff

Pension Fund, award him a disability benefit retroactive to 1 November 1976 and that the retroactive sums due to him should be calculated in United States dollars for the period during which his pension was paid in United States dollars and in local currency for the period during which his pension was paid in local currency.

- In respect of all the sums to be paid to him, Mr. PETRUC will be entitled to interest calculated at the legal rate for the period since they were payable.

- As damages, in view of the conduct towards him of the Joint Staff Pension Fund and of the FAO Staff Pension Committee and to compensate for the loss of purchasing power of the sums due to him as arrears, a loss attributable mainly, if not exclusively, to the Joint Staff Pension Fund and the FAO Staff Pension Committee, Mr. PETRUC requests the payment of a lump sum amounting to US$ 100,000.

- In respect of costs, Mr. PETRUC requests the sum of US$ 25,000 to cover the costs he has incurred over more than 13 years on consultations with lawyers, internal recourse procedures, countless trips to Rome, Geneva and Munich, costs of typing, photocopying, postage etc... as a result of bad faith, errors etc., on the part of the Joint Staff Pension Fund and the FAO Staff Pension Committee."

Whereas the Respondent filed his answer on 21 December 1991;

Whereas the Applicant filed written observations on 16 April 1991;

Whereas, on 6 May 1991, the Applicant filed an additional document;

Whereas the facts of the case are as follows:

The Applicant, a former staff member of the Food and Agriculture Organization of the United Nations (FAO), was a participant in the Pension Fund from 12 July 1966, the date of his first appointment as an expert serving in Niger. He served subsequently in Haiti, Panama and Senegal.

On 1 December 1973, the Applicant was admitted to a hospital in Dakar for emergency treatment of a tropical viral disease, a condition which he contends contributed to the progressive development of diverticular colitis. He was given sick leave in May 1974 for this condition. On 26 June 1974, the Applicant was examined by the FAO Medical Service which classified him "1A".

On 9 January 1975, the Applicant suffered a myocardial infarct in his office in Dakar. The FAO Medical Service consequently reclassified him on 7 February 1975 in category "2". On 9 June 1975, the Medical Service upgraded this medical classification to "1B".

On 7 August 1975, the Resident Representative in Senegal telexed FAO Headquarters, Rome, as follows: "URGENT WE RECEIVE FAO POSITION CONCERNING MEDICAL EXAMINATION PETRUC ROME AND EXTENSION HIS CONTRACT UNTIL 31 JANUARY 1976". The Division of Personnel and the Medical Service responded on 14 August 1975: "TRAVEL ROME PETRUC FOR MEDICAL EXAMINATION CONSIDERED UNNECESSARY STOP IN MEDICAL OFFICERS OPINION COMPLETE MEDICAL CHECKUP INCLUDING ELECTROCARDIOGRAM NECESSARY ONLY JANUARY 1976 ...".

On 29 January 1976, the FAO Medical Service conducted a complete examination of the Applicant, noting inter alia an "interim history of chronic colitis". Again, the Applicant was classified "1B". A consultation dated 3 February 1976 confirmed the "1B" classification with the following diagnosis: "Recovery from myocardial infarctus from 1975; diverticulosis of colon". FAO did not find him a position meeting the desired conditions and at his request, gave him leave without pay for the period 1 February to 31 October 1976.

On 31 October 1976, the Applicant separated from FAO service upon expiration of his fixed-term appointment. He opted for a deferred retirement benefit under article 31 of the Pension Fund Regulations then in force.

On 1 March 1977, by a letter addressed to the Director-General of FAO, the Applicant requested an examination by a medical board. By letter dated 28 March 1977, the Applicant also requested the FAO Medical Service to have him examined by a "commission", established by the FAO Director-General, to consider whether he might be entitled to a disability benefit from the Pension Fund and/or to compensation from FAO for service-incurred illness or injury.

The Applicant then lodged a series of appeals against FAO, concerning, inter alia, his entitlement to compensation for service-incurred illness or injury, his treatment while in service and the terms and conditions of his separation from service. The Applicant's appeals were considered by internal appeals bodies of FAO and, subsequently, by the ILO Administrative Tribunal in its Judgements Nos. 501 and 502 of 3 June 1982. According to the Respondent, "in the course of the consideration of the aforementioned appeals, FAO indicated its readiness to place before the FAO [Staff Pension] Committee the Applicant's claim for award of a disability benefit from the Fund. In September 1983, the FAO Administration submitted to the FAO [Staff Pension] Committee the Applicant's memorandum of 28 March 1977, but did not support the

claims contained therein". FAO had not previously done so earlier "... as the FAO Medical Service did not support the Applicant's contention that at the time of his separation (31 October 1976) he had been 'incapacitated for further service' ... ".

At its 152nd meeting, held on 28 September 1983, the FAO Staff Pension Committee was unable to reach a unanimous decision on the issue of the receivability of the Applicant's request for a disability benefit, and referred the matter to the Standing Committee of the United Nations Joint Staff Pension Board (UNJSPB). At its 159th meeting held on 29 March 1984, the Standing Committee decided that the Applicant's request for a disability benefit should be deemed receivable and it referred the case to the FAO Staff Pension Committee for consideration on its merits. On 23 April 1984, the Secretary of the UNJSPB informed the Applicant of the action taken by the Standing Committee.

At its 159th meeting, held on 30 May 1984, the FAO Staff Pension Committee decided unanimously that the Applicant was not entitled to a disability benefit under article 33 of the Pension Fund Regulations. On 11 June 1984, the Secretary of the FAO Staff Pension Committee informed the Applicant of the Committee's decision. On 13 July 1984, the Applicant requested the FAO Staff Pension Committee to review its decision. On 27 July 1984, the Secretary of the FAO Committee informed the Applicant that he had the right to request the establishment of a medical board in accordance with rule K.7 of the Administrative Rules of the Fund. The Applicant initially requested a medical board, but subsequently withdrew that request.

On 12 December 1986, the ILO Administrative Tribunal rendered Judgement No. 778 in which it severely criticized the FAO Administration for its handling of the Applicant's claims and awarded him the sum of US$ 20,000 for moral injury plus US$ 5,000 for his legal costs.

The FAO Staff Pension Committee reviewed its decision at its 189th meeting, held on 8 April 1987. It unamimously reaffirmed its earlier decision that the Applicant was not entitled to a disability benefit from the Pension Fund. On 16 April 1987, the Secretary of the FAO Staff Pension Committee informed the Applicant of the decision.

On 3 June 1987, the Applicant lodged an appeal with the Standing Committee of the UNJSPB. By letter dated 8 July 1987, the Secretary of the UNJSPB informed the Applicant of his right to request the establishment of a medical board which would assist the Standing Committee in considering the medical aspects of the case. On 12 August 1987, the Applicant requested that a medical board be set up and selected Dr. Livius Morariu of Bad Füssing, Germany, to serve on that board. Dr. Ingrid Laux, the United Nations Deputy Medical Director, was designated by the Medical Consultant to the UNJSPB. Dr. Morariu and Dr. Laux agreed on the selection of Dr. K. Theisen, a professor at the University of Munich, Germany, as the third medical practitioner on the Board.

The majority opinion of Dr. Laux and Dr. Theisen reads as follows:

> "The only final conclusion that can be drawn is that the incident [of 9 January 1975] must have been a myocardial infarction without serious sequels which in the final analysis does not justify a declaration of incapacitation for employment on 31 October 1976".

In a separate opinion Dr. Morariu's stated:

> "Unlike Professor Theisen, I am of the view that on 31 October 1976 Mr. Petruc was unfit for work as a result of an extensive anterior wall infarction on 9 January 1975".

At its 169th meeting, held on 21 July 1989, the Standing Committee considered the Applicant's appeal against the decision of the FAO Staff Pension Committee and decided unanimously to uphold that decision. The Secretary of the UNJSPB informed the Applicant accordingly on 31 July 1989.

On 27 November 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant satisfied the conditions stipulated in article 33(a) of the Regulations of the Pension Fund on the date he separated from service with FAO and, accordingly, was entitled to a disability benefit payable by the Fund.

2. The Respondent and the FAO Staff Pension Committee denied the Applicant's claims without his being accorded due process.

Whereas the Respondent's principal contentions are:

1. The Applicant was not incapacitated for further service on the date of his separation from FAO, as confirmed by the opinion of the Medical Board.

2. The Applicant was accorded due process in the consideration of his claim for a disability benefit.

The Tribunal, having deliberated from 13 to 30 May 1991, now pronounces the following judgement:

I. The Applicant is requesting rescission of the decision taken by the Standing Committee of the Pension Fund on 21 July denying him the disability benefit envisaged for in article 33(a) of the Pension Fund Regulations. Article 33(a) reads:

> "(a) A disability benefit shall, subject to article 41, be payable to a participant who is found by the Board to be incapacitated for further service in a member organization reasonably compatible with his abilities, due to injury or illness constituting an impairment to health which is likely to be permanent or of long duration."

II. In the report of the Medical Board which met on 26 November 1987 to assist the Standing Committee, the majority concluded that the application did not meet the conditions laid down in article 33(a). With regard to the illness discussed, namely, the myocardial infarct, which occurred on 9 January 1975, the Medical Board found that on 31 October 1976, the date of the Applicant's separation from service, that illness did not constitute an impairment to his health which was likely to be permanent or of long duration. The Medical Board considered that the Applicant was therefore, at that date, fit for service in a member organization reasonably compatible with his abilities.

III. The Applicant contests the independence and impartiality of the Medical Board. The Tribunal notes that the Chairman of the Board, Dr. Theisen, a professor at the University of Munich, has no links with the United Nations Medical Service. He was selected by agreement between the two doctors, Dr. Laux and Dr. Morariu, representing the Pension Fund and the Applicant respectively. In expressing an opinion contrary to that of the majority, Dr. Morariu referred to strictly medical reasons and did not, even implicitly, question his colleagues' impartiality. The Tribunal considers that the examination of the Applicant was conducted by the Board according to a proper procedure.

IV. The Applicant claims that the Medical Board did not pronounce itself on the existence, at the time when he separated from service, of another illness (diverticular colitis), which might justify the payment to him of a disability benefit in accordance with article 33(a).

The illness apparently dates back to 1973. It was the subject of a radiological examination by Dr. Ladouch on 24 May 1974. At the request of FAO, Professor Angelo Fiori examined the Applicant on 28 March 1977 to determine whether the illness was service-related. His conclusion was negative. However, this conclusion does not rule out the application of article 33(a). In his report, Professor Fiori notes that the Applicant placed greater emphasis on the link between diverticular colitis and his service and less emphasis on the link between the myocardial infarct and such service.

V. The Applicant submitted to the Tribunal a "clarification" dated 10 January 1988 from Dr. Morariu, who represented him on the Medical Board. The doctor expresses surprise that the Medical Board "discussed only one illness, the myocardial infarct, on the grounds that Professor K. Theisen was only a cardiologist and not an internist". The Tribunal notes that, in expressing his disagreement with the Board on 13 October 1988, Dr. Morariu did not refer to the fact that the examination by the Medical Board had been only partial. He gave no indication that the examination should also have covered the diverticular colitis. At the time, Dr. Morariu expressed no surprise in that regard.

VI. The Tribunal regrets that, in its reply, the Respondent gives no explanation for the failure to take account of the diverticular colitis, in order to determine whether, at the time of the Applicant's separation from service, that illness impaired his health to the extent envisaged in article 33(a) of the Pension Fund Regulations.

VII. In his letter of 12 August 1987, the Applicant requested the establishment of a medical board, which would advise the Standing Committee of the Pension Fund on the correctness of the medical conclusions upon which the disputed decision of the FAO Staff Pension Committee was based (rule K.7 of the Administrative Rules of the Pension Fund).

The Applicant also indicated the name of the doctor who was to represent him on the Board, namely, Dr. Morariu. He suggested that there should be a procedure for the appointment of a third doctor "without any relationship to or interest in the United Nations". The Applicant referred in that letter to his "first illness" and his "second illness" without expressly stating whether he was basing his application for a disability benefit on one or the other of those illnesses or on both.

VIII. The Tribunal considers that the Applicant and his representative were in a position to draw the attention of the Medical Board to the facts concerning the two illnesses mentioned. The Tribunal emphasizes in particular that when Dr. Morariu found that the Medical Board was discussing only one illness, myocardial infarct, he should have invited the Board to take a decision on the other illness mentioned by the Applicant, namely, diverticular colitis. The fact that no request was made for an examination by the Medical Board in connection with diverticular colitis might suggest that the Applicant and his doctor considered that that illness was not relevant as far as the application of article 33(a) was concerned and that only the second illness, myocardial infarct, was.

IX. In this connection, the Tribunal notes that, in its Judgement No. 778 of 12 December 1986, the ILO Administrative Tribunal states, on the one hand, that the Applicant fell ill with colitis in Senegal in 1973 and spent

three weeks in the main Dakar Hospital and, on the other hand, that, as a result of a medical examination he underwent in Rome on 26 June 1974, he was given the highest health rating (1A).

X. The Tribunal considers that, assuming that the Applicant had not given up the idea of basing his application for a disability benefit on diverticular colitis, he and his representative, Dr. Morariu, were negligent in not raising that question before the Medical Board when they found that the Board was not discussing it.

XI. Whatever grievances the Applicant might have had against his employer, which created in the ILO Administrative Tribunal (Judgement of 12 December 1986) a feeling of "embarrassment" and an impression of "carelessness" leading to criticism by it, there was no reason for him to project those grievances unreservedly onto the Pension Fund, which fully respected his rights. The Applicant had every opportunity to explain his point of view to the Medical Board. If he considered that diverticular colitis entitled him to a benefit under article 33(a), neither he nor the doctor who represented him did what was necessary to ensure that this problem was discussed by the Medical Board.

XII. In the light of all these considerations and the amount of time that has elapsed, the Tribunal considers that it would not serve any useful purpose to request a medical board to examine the question whether, at the time of the Applicant's separation from service, diverticular colitis was an illness constituting an impairment to his health which was likely to be permanent or of long duration, incapacitating him for further service in a member organization reasonably compatible with his abilities.

XIII. The Applicant requested the Tribunal to order the production of the "report of the Medical Board of 26 November 1987". The Respondent maintains that the Board's "report" of 26 November 1987 constitutes that document and that no other document was issued by the Board. The Tribunal notes that the Applicant has thus received the communication he requested.

XIV. The Tribunal accordingly decides that:

1. There is no reason to rescind the decision of the Standing Committee of the UNJSPB dated 21 July 1989.

2. All other pleas of the Applicant are also rejected.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
Vice-President

Samar SEN
Member

Geneva, 30 May 1991

Paul C. SZASZ
Acting Executive Secretary